United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

43

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Number 24,133

IN RE: JOHN C. MCCLURE
EARL SWICEGOOD,
AURIN DALE LITTLE
Appellant

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

Whether the trial court erred by denying appellant the procedural due process to which he was entitled under Rule 42(b), Federal Rules of Criminal Procedure with respect to the hearing conducted herein?

Whether the trial court erred in denying appellant's motion for a judgment of acquittal at the close of the government's case?

Whether the trial court erred in denying appellant's motion for a judgment of acquittal at the close of all the evidence?

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,133

IN RE: John C. McClure
Earl Swicegood, Appellant
Aurin Dale Little

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURIDICTIONAL STATEMENT

On March 4, 1970, in the United States District Court for the District of Columbia, the Honorable Leonard P. Walsh presiding, appellant, Earl Swicegood, was convicted of criminal contempt. Notice of appeal was filed in a timely manner and appellant was allowed to proceed without pre-payment of costs. The jurisdiction of this Court is properly invoked pursuant to the rules of this Court and 28 U.S.Code, Section 1291.

STATEMENT OF THE CASE

On March 3, 1970, during the course of a first degree murder trial (United States of America v. John C. McClure, Criminal Number 1032-68) before the Honorable Leonard P. Walsh, the following circumstances developed which gave rise to the conviction herein appealed.

During the morning recess, the Assistant United States Attorney assigned to try the McClure case advised the Court, in chambers, that Detective Richard Thornton[1] and a spectator[2] had observed a "threating gesture" being made toward the Government witness then testifying, a Mr. John Petroutsa (Tr. 161).

A few minutes later, at the bench, Detective Thornton advised the Court that he had observed a spectator[3] make a motion with his hand (Tr. 164-165, 168). Detective Thornton further stated that "it [the motion] meant nothing to me until the young man sitting in front of him threaten [sic] the

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1/ Who had earlier been asked to closely observe Mr. Swicegood and Mr. Little (Tr. 161).

2/ Later identified as Mr. Ernest Trakas (Tr. 165).

3/ Later identified as the appellant, Earl Swicegood (Tr. 168, 307).

witness's life" (Tr. 165, 307).

Mr. Trakas[4] was then called to the bench where he stated "I was sitting back there where the two hippies[5] were talking as Mr. Petroutsa was giving a statement. I believe when he finished his statement, and Mr. Frankel[6] wasn't asking him any more questions, he was just sitting there. The bigger of the two [Mr. Swicegood] made a motion with his hand like this, like he had a gun in his hand and said, 'I am going to blow that guy away'[7]. Just like that and pointed right at him [Petroutsa]". (Tr. 165, 167)

Deputy Marshal Kragh then advised the Court that after observing Mr. Swicegood and Mr. Little talking, he told them, "if you don't stop talking you are going to leave the courtroom" (Tr. 167, 168).

At this juncture, the Court stated that a bench warrant would issue for both Mr. Swicegood and Mr. Little and immediately thereafter both re-appeared in the courtroom

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4/ Mr. Trakas later described himself as a friend of the deceased in the McClure trial (Tr. 310) who was in Court as a spectator and not as a witness (Tr. 312).

5/ Appellant Swicegood and Mr. Little

6/ The Assistant United States Attorney

7/ Or as stated more succinctly later, "I am going to blow that mother fucker away" (Tr. 166, 169, 311, 315).

(Tr. 167). The Court then called both Mr. Swicegood and Mr. Little before the bench where, after answering several preliminary questions, both were held pending disposition later in the day (Tr. 167-169). Arrangements were then made for counsel to be appointed and the trial resumed (Tr. 170-171).

Upon arrival of counsel from the Legal Aid Agency, both Mr. Swicegood and Mr. Little were again called before the Court at which time a fairly lengthy colloguy ensued (Tr. 212-219) at the conclusion of which the Court stated that both defendants would be released (Tr. 217-219) thus seemingly ending the proceedings. However, the Assistant United States Attorney then requested and was granted "leave to show cause why either or both of these defendants would not be held in contempt of Court" (Tr. 217-219).

Upon reconvening at 2:00 p.m., defendants' counsel endeavored to clarify the status of the proceedings and was informed that both defendants had already been held in contempt[8/] and that the matter would be finally disposed of at the conclusion of the trial day (Tr. 220-221).

At 4:16 p.m. the "contempt hearing" reconvened with the Assistant United States Attorney making reference to

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8/ A finding at odds with the procedure which was to follow.

the "alleged conduct" of defendants and calling as his first witness, Detective Thornton whose testimony was substantially the same as that related earlier (Tr. 305-309).

The Government next called Mr. Ernest Trakas who stated that while sitting in the public section of the courtroom he observed appellant pointing[9/] at the witness Petroutsa and heard appellant say "something to the effect that he was sick and tired of him [Petroutsa] lying and used some obscene language"--"I'm going to blow that mother fucker away" (Tr. 311, 315]. Mr. Trakas went on to say that he wasn't paying too much attention to the conversation between appellant and Mr. Little (Tr. 314), that there were some words said which he could not hear (Tr. 315-316) and that he was mostly interested in the testimony of the witness then on the stand (Tr. 315-316).

The Government next called Mr. John Petroutsa, the witness allegedly threatened by appellant, who offered no testimony (Tr. 317-318).

As its next witness, the Government called Deputy

9/ With his index finger parallel to the ground and his thumb perpendicular to the ground (Tr. 310, 325, 326).

Marshal Robert Kragh who testified that during a bench conference he approached appellant and Mr. Little[10] and told them that "if they didn't stop talking, they'd have to leave the courtroom" (Tr. 319). Deputy Marshal Kragh further stated that when asked to discontinue their conversation, both appellant and Mr. Little complied (Tr. 320).

At the conclusion of Deputy Marshal Kragh's testimony, the Government rested its case (Tr. 320) and defense counsel moved for a judgment of acquittal, such motion being denied (Tr. 320-322).

As its first witness, the defense called the appellant, Earl Swicegood who testified that he was a former friend of the defendant (John McClure) then on trial and that in fact he did engage in a conversation with Mr. Little in which he commented upon and characterized the testimony and gestures of the witness Petroutsa who was then on the stand. He further stated that in his opinion, the witness was "over dramatizing" his account in such a way so as to make it appear that McClure "was a gangster that had just went in

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10/ As well as two other people seated in another part of the courtroom.

there and killed the mother fucker" (Tr. 323-325). Appellant went on to explain that the gesture with his thumb and index finger was made while characterizing the witness' testimony, was not intended as a threat (Tr. 326) and was not made toward the witness but rather toward Mr. Little with whom appellant was talking (Tr. 327).

After being cross-examined, appellant was examined by the Court regarding the exact nature of the testimony which appellant was characterizing (Tr. 336-338).

After conclusion of appellant's testimony, the proceedings were dismissed against Mr. Little and appellant was released to return the following morning (Tr. 337-342).

Upon reconvening on March 4, 1970, defense counsel submitted a written memorandum to the Court and after a collateral discussion regarding newspaper accounts of the previous days proceedings, the contempt hearing resumed (Tr. 353-371).

As its next witness, the defense called Mr. James L. Mason who testified that as a senior at George Washington University he was required to observe a criminal trial in conjunction with a course in the sociology of law and

that pursuant to that requirement he had been a spectator at the McClure trial on March 3, 1970 (Tr. 378-379). Mr. Mason stated that he and a classmate, Miss Christine Kulick, were sitting "directly next to" appellant and Mr. Little for a period of about one hour and did not observe any gestures or unusual behavior nor notice or overhear any conversations involving appellant and Mr. Little (Tr. 380-383).

As its final witness, the defense called Miss Christine Kulick who testified that as a senior at George Washington University she was required to observe a criminal trial in conjunction with a course in the sociology of law and that pursuant to that requirement she had been a spectator at the McClure trial on March 3, 1970 (Tr. 384-385). Miss Kulick stated that she sat approximately one person away from appellant for approximately forty-five minutes during which time she did not observe appellant make any gestures or hear him engage in any conversation (Tr. 386). Miss Kulick also stated that on March 2, the witness Trakas had told her that "whatever Mr. Swicegood said was not true" (Tr. 389).

After a question with respect to Mr. Petroutsa's testimony was resolved, both counsel had opportunity for argument [11] at the conclusion of which the trial judge found appellant guilty of contempt, imposed a sentence of ten days and suspended execution of sentence (Tr. 392-410).

11/ During which defense counsel again moved for a judgment of acquittal (Tr. 397-398).

SUMMARY OF THE ARGUMENT

Appellant rests his appeal on three points:

(1) That the trial court erred by denying appellant the procedural due process to which he was entitled under Rule 42(b), Federal Rules of Criminal Procedure with respect to the hearing conducted herein.

(2) That the trial court erred in denying appellant's motion for a judgment of acquittal at the close of the government's case.

(3) That the trial court erred in denying appellant's motion for a judgment of acquittal at the close of all the evidence.

ARGUMENT I

THE TRIAL COURT ERRED BY DENYING APPELLANT THE PROCEDURAL DUE PROCESS TO WHICH HE WAS ENTITLED UNDER RULE 42(b), FEDERAL RULES OF CRIMINAL PROCEDURE WITH RESPECT TO THE HEARING CONDUCTED HEREIN

Since the proceedings herein involved conduct which was not seen or heard by the Court and therefore not subject to summary disposition under Rule 42(a)[12], appellant was entitled to the procedural safeguards set forth in Rule 42(b).

Rule 42(b) provides requirements for:

(1) Notice of the time and place of the hearing.

(2) A reasonable time for the preparation of the defense.

(3) Notice of the essential facts constituting the offense charged.

Such notice may be given orally by the Court in the presence of the defendant or on application of the United States Attorney by an order to show cause or an order of arrest. In appellant's case, neither he nor his attorney were advised by the Court of the fact that there would be a hearing

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12/ The trial judge's statement that he had acted in a summary fashion notwithstanding (Tr. 220).

and the only notice of any kind which was received was in the form of the Government's Petition For Order To Show Cause Why Earl Swicegood and Aurin Dale Little Should Not Be Punished For Criminal Contempt.[13/]

The issue of proper notice was further confused by the trial court's subsequent statement that the Court had held both Mr. Swicegood and Mr. Little in contempt prior to the taking of any testimony and the appointment of counsel (Tr. 220).

In summary, the actions and statements of the trial judge and the Assistant United States Attorney not only failed to provide adequate notice under Rule 42(b) but additionally served to promote an atmosphere of which even Lewis Carroll could be proud.

13/ The precise function of this petition both the context of the requirements of Rule 42(b) and the circumstances surrounding the trial judge's apparent dismissal of proceedings is far from clear (Tr. 217-219).

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE

The test to be applied in ruling on a motion for judgment of acquittal has been clearly defined. Curley v. United States, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232 cert. denied, 331 U.S. 837 (1947); Crawford v. United States, 126 U.S. App. D.C. 156, 375 F.2d 232 (1967). Recently, this Court has stated "that the Government's case cannot rest on mere suspicion, conjecture or speculation. There must be sufficient credible evidence and justifiable inferences of fact from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt". United States v. Skinner, __ U.S. App. D.C. ___, ___, ___F.2d ___, ____ (No. 22,776 decided 2/10/70 Slip Opinion at pp. 4-5).

In defining the crime of criminal contempt, 18 U.S. Code, Section 401 states:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as ---
>
> (1) Misbehavior of any person in its presence or so near thereto

> as to obstruct the administration of justice;
> (2) Misbehavior of any of its officers in their official transactions;
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command." (emphasis supplied)

As appellant's alleged conduct is clearly outside the purview of subsections (2) and (3), a factual basis for a finding of contempt may be established under subsection (1) only.

In order to establish the offense of contempt under subsection (1), three elements must be proven:

(1) There must be some form of conduct constituting misbehavior.

(2) Either in the presence of the Court or so near thereto.

(3) As to obstruct the administration of justice.

Appellant submits that the government failed to establish elements (1) and (3).

In its case-in-chief, the government introduced evidence that appellant (1) used profanity (2) in the course of uttering a threat (3) while gesturing or pointing toward a witness seated in the courtroom. Appellant submits that

such allegations, when considered in and light most favorable to the government, fail to establish "misbehavior" as envisioned by 18 U.S.Code, Section 401(1).

The government's evidence with respect to "misbehavior" consisted of combining hearsay with an ambiguous gesture in an effort to prove wrongdoing. While appellant is unable to find any case defining in the abstract "misbehavior", it is submitted that the conduct alleged in the government's case failed to meet the threshold factual requirement due to the following infirmities:

(1) The alleged statement and gesture were testified to by only Detective Thornton and Mr. Trakas [14], the former of whom could only testify to an ambiguous gesture (Tr. 165) [15].

14/ In assessing Mr. Trakas' credibility, it is important to note that he was a friend of the deceased in the McClure trial (Tr. 310), was present as a spectator only (Tr. 312) and had previously indicated a bias against appellant by calling him a hippie (Tr. 165) and by previously telling Miss Kulick that whatever appellant might have said to her was not true (Tr. 389).

15/ Appellant submits that this Court can take judicial notice of the fact that in all the courtrooms in the United States Courthouse for the District of Columbia, all seated spectators face the front of the courtroom or that portion in which the witness stand is located, thus rendering even, more ambiguous the testimony

(2) Although called as a government witness in the contempt proceeding, Mr. Petroutsa, the alleged object of the threat, failed to state that in fact he heard or observed the alleged threat.

(3) Neither Deputy Marshal Kragh, whose duty it was to maintain order in the courtroom, nor any other party present was offered to corroborate the statement of Mr. Trakas.

(4) The government failed to offer any other evidence of misbehavior, appellant's intent etc.

Appellant respectfully submits that his research has revealed the following:

(1) That the overwhelming majority of cases discussing conduct constituting "misbehavior" are inapplicable as dealing with summary proceedings under Rule 42(a), and

(2) That very few cases have dealt with the conduct of spectators 16/

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that appellant was gesturing toward the witness then on the stand.

16/ See United States ex rel Judge Edwin A. Robson v. Malone, 412 F.2d 848 (7th Cir. 1969) and cases cited therein.

and that therefore, there is no authority supporting the trial court's finding that appellant's conduct constituted misbehavior.

The government's evidence with respect to obstruction of the administration of justice is even less persuasive.

(1) There is no allegation that the proceedings then in progress were in any way interrupted, interfered with, obstructed etc.

(2) In fact the alleged conduct was not even made known to the parties involved until the Assistant United States Attorney was advised by Detective Thornton at a recess.

(3) Even after being advised, no relevant party[17] was produced who could offer any evidence in support of the government's claim that there had been an obstruction of justice[18].

17/ Trial judge, marshal, courtroom clerk, court reporter, prosecutor, defense counsel, juror or witness.

18/ See State v. Jones, 253 A.2d 193, 199 (1969) and cases cited therein. It is important to note that the New Jersey contempt statute, N.J.S.A. 2A:10-1a., does not explicitly include the "obstruction" element but nevertheless is a necessary element of the offense. It should also be noted that Jones was a summary proceeding.

Finally, with respect to both the elements of misbehavior and obstruction of justice, there was not the slightest showing that appellant intended to engage in conduct constituting contempt.

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE

At the close of all the evidence, the trial court had the following additional testimony before it:

(1) Appellant's testimony that during the course of a conversation with Mr. Little, he (Mr. Swicegood) discussed and characterized Mr. Petroutsa's testimony and while doing so, used the words "mother fucker" (Tr. 325).

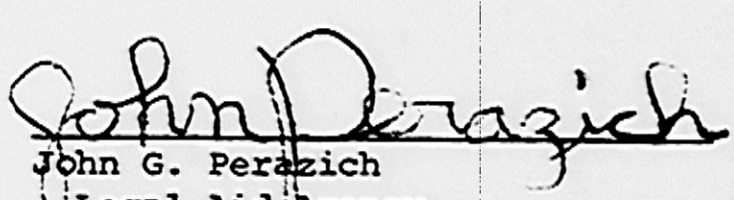
(2) The testimony of Mr. Mason and Miss Kulick that they had been sitting next to appellant for forty-five monutes to an hour and did not observe any gestures or unusual behavior nor notice or overhear any conversations involving appellant and Mr. Little.

Thus, considering all of the evidence presented and considering the elements of the alleged offense, there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction herein and order dismissal of this contempt proceeding.

Respectfully submitted,



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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,133

IN RE: EARL SWIGEGOOD, APPELLANT

Appeal from the United States District Court
for the District of Columbia

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JOHN A. TERRY,
SANDOR FRANKEL,
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Miscellaneous No. 10-70

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* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Was adequate notice of the contempt hearing provided appellant under Rule 42(b), F. R. Cr. P.?

II. Was the evidence of contemptuous conduct sufficient to withstand appellant's motions for judgment of acquittal?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,133

IN RE: EARL SWICEGOOD, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Based on conduct occurring on March 3, 1970 during the first degree murder trial of John C. McClure (Criminal No. 1032-68) before Judge Leonard P. Walsh and a jury, appellant was found guilty of contempt of court and sentenced to ten days of imprisonment.[1] The execution of sentence was suspended.

The Contempt Hearing[2]

In the contempt proceeding March 3-4, 1970 six witnesses testified, three for the Government and three for the defense, including appellant.

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[1] Aurin Dale Little, appellant's companion, was also originally brought before the court for alleged misconduct, but was not found in contempt (Tr. 341).

[2] Some prior proceedings are more appropriately set forth in connection with Argument I, *infra*, involving sufficiency of notice of the hearing.

Prosecution

Richard F. Thorton

An officer with the Homicide Squad of the Metropolitan Police Department, Mr. Thornton sat in the rear of the courtroom during the trial proceedings to observe appellant Swicegood and Little who sat three rows in front of him (Tr. 305-307). During the testimony of Government witness John Petroutsa, Officer Thornton's attention was attracted by appellant pointing toward the wtiness on the stand and saying something (Tr. 307). Although he was unable to hear what was said, a person (Ernest Trakas) not previously known to him who sat on a row behind appellant, told him during a recess "I heard that man [Swicegood] threaten a witness and say he was going to kill him" (Tr. 307-309).

Ernest Trakas

A friend of the deceased (Tommy Williams), Mr. Trakas was sitting in the courtroom during the questioning of Mr. Petroutsa by the prosecutor when appellant stated "[h]e was sick and tired of this 'mother fucker' lying and he pointed at him and said, 'I'm going to blow that mother fucker away." (Tr. 310-311, 313, 316). The pointing was demonstrated with the index finger (straight) and the thumb "pointed up in the air" (Tr. 310). Mr. Trakas categorically stated that appellant's words, "I'm going to blow that mother fucker away", were exact (Tr. 314). There were other comments, but only these were loud enough to hear (Tr. 315). The person (Little) sitting with appellant did not say anything (Tr. 313). One Miss Christine Kulick (called by the defense), whom Mr. Trakas met on the previous trial day, sat near appellant and Mr. Little at some point before a court recess, and after the recess sat on the opposite side of the courtroom (Tr. 312). Another person, Jim Mason (also called by the defense), Mr. Trakas did not know (Tr. 311-312).

Robert C. Kragh[3]

Mr. Kragh, the courtroom marshall, testified that he was present during a bench conference when the prosecutor brought up the matter of alleged threats (Tr. 318). During this conference, Mr. Kragh observed appellant and Little, among others, talking, and told them to be quiet. All complied. Thereafter the court recessed (Tr. 320).

Defense

Appellant Swicegood

Appellant, twenty five years old, testified that he was a personal friend of the defendant, John McClure, of some 3 or 4 years (Tr. 323-324). He had no personal knowledge of the crucial events involved in the trial but was interested in the trial proceedings out of "friendship"[4] (Tr. 323-324). Appellant stated that he did have a conversation with Mr. Little during Mr. Petroutsa's testimony and that his statements were intended as comments on it:

> Well, the witness was talking, giving his explanation of what happened at the scene of the crime . . . and I thought the way that he was talking, he was over-dramatizing the whole thing, to my best estimate; I wasn't there; maybe he wasn't. This is just my belief, that with the coat and the gun, and you know, like that, you know, he's the protector,[4] and all this. And he kept doing this . . . [gesturing as had been indicated previously by witnesses—with the first finger pointed out and thumb pointed upwards].
>
> • • • •

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[3] John Petroutsa, the witness testifying during the questioned conduct, was called to testify before Mr. Kragh but objection was sustained to Mr. Petroutsa's proffered testimony that he had been "shot at and . . . had harassing phone calls." Mr. Petroutsa gave no testimony (Tr. 317-318).

[4] An apparent reference to appellant's friend, defendant McClure, on trial for shooting the deceased in the back while claiming to aid others. See prosecutor's opening statement, Tr. 103-109.

> And it just seemed to me like he overdramatized it and I leaned over and I says [sic], "I don't believe how that boy's opinion [presumably about the having of a gun or the manner of its concealment, Tr. 325] could be entered in Court, like that, "as, you know, what he had seen." And then he kept on and kept on. And then I said, "The way he says it is like John [the defendant] was a gangster that had just went in there and killed the mother fucker, man, just went in and killed him." That's the way I said it, "just didn't have nothing on his mind, just went in there and started killing people", and that's the way he was going and that was just my belief and I was making a comment on it. I didn't—on well, never mind, that's what I said and that's what I did say, like Tommy [?] was going to kill the mother fucker, like he was just going to kill him, and he just kept on. That was my conversation, that's the way I said it. (Tr. 324-326).

Appellant denied intending any threats or threatening gesture to the witness Petroutsa, but admitted that the "pointing" was about shoulder level during the conversation and that there was no apparent obstruction between him and the witness stand (Tr. 330-331). While he waved his finger in the manner of the gesture indicated, he did not intend to point it at anyone in talking to Mr. Little and thought it was pointed toward the wall (Tr. 328-329). His gesturing was done in the manner of having a gun because the witness' testimony at the time appeared to concern a gun and the witness was pointing and gesturing also (Tr. 336-338, 340).

Jim Mason

A George Washington University senior student observing the court proceedings as a requirement in a sociology of law course, Mr. Mason testified that for approximately an hour before a recess on the morning in question he sat near the aisle next to another student in the course, Miss Christeen Kulick (Tr. 378-379, 381). Next to Miss Kulick sat Mr. Little, and then appellant (Tr. 378-379,

381). Mr. Mason did not hear any conversation between appellant and Mr. Little, nor did he observe any unusual behavior (Tr. 382). After appellant and Mr. Little had been called before the court and during a recess of the case, Mr. Mason complied with a request of the prosecutor to sit on the other side of the courtroom (Tr. 383).

Christeen Kulick

Also a senior student in the same course as Mr. Mason, Miss Kulick testified that a person sat between her and appellant in the courtroom and during approximately 45 minutes she did not hear any conversation involving appellant or observe him make any gestures (Tr. 384-385, 386, 389, 390).

ARGUMENT

I. Adequate notice of the contempt hearing was provided appellant under Rule 42(b), F.R.Cr.P.

(Tr. 160-171, 212-221, 371-374, 397)

Appellant complains that under Rule 42(b), F.R.Cr.P. he was denied notice of the instant contempt proceedings (Appellant's brief, pp. 11-12). We regard the claim as frivolous.

Rule 42(b) provides in pertinent part:

> A criminal contempt . . . shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. *The notice shall be given orally by the judge in open court in the presence of the defendant* or, *on application of the United States attorney . . . by an order to show cause* or an order of arrest. (Emphasis added).

The record facts evince both methods of notice here. Although the trial judge, upon hearing unsworn statements from Officer Thornton and Ernest Trakas *in the presence of appellant* indicating that appellant had made

a threatening gesture toward witness Petroutsa and ordered appellant and Mr. Little into custody as a result (Tr. 160-162, 164-170), we think it is clear on the record that this did not constitute the contempt hearing itself. Particularly is this so because the trial judge, keenly aware that appellant's companion, Mr. Little, apparently said nothing, was solicitous that counsel be obtained for both men immediately (Tr. 169-170).

After defense counsel appeared in the courtroom before the noon recess, having interviewed appellant and Mr. Little, and stated to the court that he was prepared to represent them (Tr. 212-214), the trial judge, hearing from both appellant and Little, released them from custody with at first no more than some strictures (Tr. 215-219). However, the prosecutor requested and was given the opportunity to file a petition that afternoon for appellant and Little to show cause why they should not be held in contempt of court[5] (Tr. 217-219). Appellant, Little, and counsel were to return that afternoon (Tr. 217-219). At the commencement of the afternoon session (2:00 p.m.), defense counsel assumed in his court representations that the court had not found his clients guilty of any contempt. The court in correcting the misapprehension of counsel indicated (we think inadvertently and perhaps contradictorily in view of the full contempt proceedings that he did subsequently undertake),[6] that appellant and Little had already been held in contempt when they were ordered into custody[7] (Tr. 220-221). Significantly however, at the conclusion of the trial proceedings late in the afternoon (4:16 p.m.) the court, upon the duly filed petition for an order to show cause commenced to hear the sworn testimony of three Government witnesses, appellant, and on the following day, his two defense witnesses.

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[5] Miscellaneous No. 10-70, p. 1.

[6] See Counterstatement, *supra*, pp. 2-5.

[7] This action may appear more in the nature of an "order of arrest" under Rule 42(b).

The unfortunate indication that appellant and Little had already been held in contempt could not have rendered counsel or appellant unmindful of the specific opportunity given the Government to initiate upon petition formal contempt proceedings, in which appellant would be represented by prepared and experienced counsel and would have the rights of any criminally accused, including but not limited to the exercise here of the right to confrontation and cross-examination of adverse witnesses under oath, to testing the sufficiency of the Government's case, to testifying himself as well as to obtaining the testimony of witnesses in his behalf. See *Offutt* v. *United States*, 98 U.S.App.D.C. 69, 71-72, 232 F.2d 69, 71-72, *cert. denied*, 351 U.S. 988 (1956), following *Cooke* v. *United States*, 267 U.S. 517 (1925).

To even suggest under these circumstances that appellant might not have been given notice of the time and place of the contempt hearing (as well as reasonable time for preparation and notice of the essential facts constituting the offense) compliably with Rule 42(b), is to exalt fantasy.[8] Perhaps it is enough to state that counsel, who apparently had every opportunity to make sufficient preparation, and surely did so[9] (the reason for which "notice" is obviously intended), had no occasion to complain in the District Court.

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[8] See, *In re Fletcher*, 216 F.2d 915 (4th Cir. 1954), *cert. denied*, 348 U.S. 931, 350 U.S. 864 (1955) where technical deficiencies in summary contempt proceeding, such as no showing prosecutor had applied for petition for order to show cause, no certificate by judge that he had seen or heard the conduct, no drawing of the charge by the prosecutor but by the judge, could not minimize the fact that appellant had all the safeguards for protection of one accused of criminal contempt, including notice and the opportunity to be heard.

[9] Note, among other things, the ample time to interview appellant and Little (Tr. 170-171, 212-214) to contact and interview defense witnesses (Tr. 371, 373), to review trial transcript (Tr. 374), and to file Memorandum of points and authorities (Tr. 397) (Miscellaneous No. 10-70, p. 2.)

II. The evidence of contemptuous conduct was sufficient to withstand appellant's motions for judgment of acquittal.[10]

(Tr. 169, 324-337, 340, 383-384, 391)

At the close of the Government's Case.

As applicable here Title 18 U.S.C. § 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice. . . .

Appellant contends that there was no showing in the Government's case of conduct constituting "misbehavior", and if so it did not amount to an obstruction of justice (Appellant's brief, pp. 13-17). Appellant finds that "[t]he Government's evidence with respect to 'misbehavior' consisted of combining hearsay with an ambiguous gesture in an effort to prove wrongdoing" (Appellant's brief, p. 15). The court could find, and undoubtedly did,[11] that appellant intended to threaten witness Petroutsa.[12] Far from any "hearsay" as we understand the term, a courtroom spectator heard appellant say, among other things concerning the witness (Petroutsa) then testifying, that he (appellant) "was sick and tired of this mother fucker lying" and that he "was going to blow that mother fucker away." We feel these audible statements alone would constitute contempt, being such as to embarass, hinder, or obstruct the court in the administration of justice, or

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[10] Appellant's arguments II and III, both questioning the sufficiency of the evidence, are treated together herein.

[11] See Order of contempt filed March 10, 1970, Miscellaneous No. 10-70, p. 6.

[12] See testimony of witnesses Thorton and Trakas, Counterstatement, *supra*.

to lessen its authority or dignity.[13] See *United States* v. *Pearson*, 62 F. Supp. 767 (1945); *cf. Gridley* v. *United States*, 44 F.2d 716 (6th Cir. 1930) (defendant's statement to witness, "You are a damned liar," constituted contempt, being "misbehavior in the presence of the court" under 28 U.S.C.A. § 385). In addition, however, appellant's statements were accompanied, not by any "ambiguous gesture", but by a highly visible pointing at the witness in an unmistakable manner symbolic of having a gun[14] (Tr. 328-331, 333). With this clear evidence, apart from permissible inferences, it would be difficult indeed to avoid the conclusion that the Government had established sufficiently at this juncture contemptuous conduct by this appellant. See, *e.g. Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 232 (1967).

At the conclusion of appellants' case.

Appellant cannot validly contend that anything in his evidence could substantially weaken the Government's strong showing (Appellant's brief, p. 19). Indeed his evidence only strengthened it more. Appellant admitted himself that he used the profanity ascribed to him (Tr. 332) and also that he made the gun-gesture. While he claimed however that he was not threatening the witness, but merely intending to follow in his own natural and somewhat histrionic manner an unacceptable description of the crucial shooting and the gesturing of the witness himself (Tr. 324-325, 336-337, 340; see Tr. 391), the court was not obliged to accept this. Even if appellant had such intentions, the improper language he admitted using

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[13] It appears that at least twice the court previously admonished appellant and his companion Little about improper conduct in the courtroom (Tr. 169). *Cf. United States* v. *Bollenbach*, 125 F.2d 458 (2nd Cir. 1942) (defendant in opening statement persisted in making obscene references regarding persons who had "worked up" case for the prosecution).

[14] See testimony of Officer Thornton and Mr. Trakas, Counter-statement, *supra*, p. 2. Appellant himself indicated the gesturing was to indicate a gun, but his admitted purpose was not to threaten (Tr. 324-325, 336-337, 340).

would appear, as stated previously, to indicate sufficient disrespect for the dignity of the court to constitute contempt.

What beneficial contribution the testimony of Mr. Mason and Miss Kulick made to appellant's defense remains doubtful, as both categorically denied hearing any statements made by him or observing him gesturing, both of which he admitted. To argue, as appellant seems, that his conduct was not sufficiently indecorous, or menacing, to be noticed by these students diligently taking notes (Tr. 383-384) and watching these proceedings as a course requirement is to miss the point. The point is the character of the conduct itself—not whether it escaped the casual notice of some of the courtroom spectators—or the witness on the stand toward whom it was directed.[15]

The evidence was clearly sufficient to warrant a conclusion of guilt beyond a reasonable doubt.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court be affirmed.

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[15] See *Conley* v. *United States*, 59 F.2d 929 (8th Cir. 1932) (questioned conduct need not actually obstruct the administration of justice, or necessarily have that result, if its tendency is of that nature). "[A]bsence of . . . [contumacious] intent [which appellant claims (Brief, pp. 16, 18)] may go only to mitigation." *Offutt* v. *United States*, *supra* at 72, 232 F.2d at 72.

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